The Topps Co Inc v Mally Jaya Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D2–24–182 OF 1993
LOW HOP BING J
17 NOVEMBER 1997

Bankruptcy *— Capacity of bankrupt — Prohibition against involvement in management of company — Absence of prior permission of the Official Assignee or of the court under s 38(1)(d) of the Bankruptcy Act 1967 — Whether prohibition is wide enough to prohibit bankrupt from holding himself out in his affidavit as a general manager — Bankruptcy Act 1967 ss 38(1)(d) & 109*

Bankruptcy *— Capacity of bankrupt — Whether bankrupt could affirm affidavit — Whether bankrupt must disclose his incapacity in the affidavit — Whether failure to disclose is ground for setting aside order made in reliance of affidavit*

Civil Procedure *— Affidavits — Capacity to affirm — Whether undischarged bankrupt competent to affirm affidavit — Whether undischarged bankrupt must disclose his incapacity in the affidavit — Whether failure to disclose is ground for setting aside order made in reliance of affidavit*

The applicant in this case obtained an ex parte trade description order pursuant to s 16 of the Trade Descriptions Act 1972. The application was supported by an affidavit which was affirmed by one Goh Weng Nam who at the date of affirming the affidavit was an undischarged bankrupt. The respondent in this application sought to set aside the ex parte order on the grounds that the deponent was an undischarged bankrupt and in consequence was incapacitated from affirming the affidavit and secondly that as a result of the non-disclosure of the deponent's incapacity as an undischarged bankrupt and his continued description as a general manager of a company in his affidavit, the ex parte order was bad in law.

Held, setting aside the ex parte order:

(1) The mere fact that a deponent is an undischarged bankrupt does not deprive him of any legal competency in affirming an affidavit in support of the ex parte application for use in any court proceedings (see pp 748I and 749A).

However, the status of a deponent who is an undischarged bankrupt is a material fact which must be made known to the court. It is trite law that in an ex parte application, the applicant is legally bound to make full and frank disclosure of all material facts, since such an application is an application of utmost good faith or uberrimae fidei (see p 749C–D); *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat* [1985] 1 CLJ 449 and *Kibi (M) Sdn Bhd & Yang Lain lwn Cheng Chew Chye (t/a Chuan Heng Import & Export) & Yang Lain* [1995] 1 AMR 399 followed.

A The non-disclosure of this material fact pertaining to the deponent's capacity as undischarged bankrupt has fallen short of the standard of utmost good faith and the ex parte order should on this ground alone be set aside (see p 749D–E); *Tunas (Pte) Ltd v Mayer Investment Pte Ltd* [1989] 2 MLJ 132; *PMK Rajah v Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 86; *Ellinger v* B *Guinness Mahon & Co* [1939] 4 All ER 16 and *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 followed.

(2) The deponent cannot, by virtue as his status as an undischarged bankrupt, in the absence of previous permission of the Official Assignee or of the court under s 38(1)(d) of the Bankruptcy Act C 1967 hold the position of a general manager. Sections 38(1)(d) and 109 of the Bankruptcy Act 1967 clearly prohibit an undischarged bankrupt from otherwise directly or indirectly taking part in the management of any company. The prohibition is very wide in its scope and certainly wide enough to prohibit the D deponent from holding himself out in his affidavit as a general manager when the deponent was an undischarged bankrupt at the time of affirming his affidavit (see pp 749H–I and 750F–G); *Commissioner of Corporate Affairs (Vic) v Bracht* (1989) 14 ACLR 728 followed.

E

[Bahasa Malaysia summary

Pemohon dalam kes ini telah memperolehi satu perintah perihal dagangan secara ex parte menurut s 16 Akta Perihal Dagangan 1972. Permohonan disokong oleh afidavit yang diikrar oleh seorang bernama Goh Weng Nam yang adalah seorang bankrap yang belum dilepaskan F pada tarikh mengikrar afidavit. Penentang dalam permohonan ini memohon supaya perintah ex parte itu diketepikan atas alasan bahawa saksi sumpah adalah seorang yang belum dilepaskan dan akibatnya tidak berupaya mengirkar afidavit dan kedua, bahawa akibat ketakdedahan ketidakupayaan saksi sumpah sebagai bankrap yang G belum dilepaskan dan penggambarannya yang berterusan sebagai seorang pengurus besar sebuah syarikat dalam afidavitnya, perintah ex parte itu adalah tidak elok dari segi undang-undang.

Diputuskan, mengetepikan perintah ex parte:

H (1) Hakikat semata-mata bahawa seorang saksi sumpah adalah bankrap yang belum dilepaskan tidak melucutkannya daripada sebarang kompeten undang-undang dalam mengikrar afidavit bagi menyokong permohonan ex parte untuk kegunaan dalam mana-mana prosiding mahkamah (lihat ms 748I dan 749A).

I Walau bagaimanapun, taraf saksi sumpah yang merupakan seorang bankrap yang belum dilepaskan adalah fakta material yang mesti diumumkan kepada mahkamah. Adalah undang-undang mantap bahawa dalam permohonan ex parte, pemohon

wajib di sisi undang-undang untuk membuat pendedahan penuh dan terus-terang atas segala fakta material, oleh kerana permohonan sedemikian adalah permohonan dengan suci hati tertinggi atau uberrimae fidei (lihat ms 749C–D); *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat* [1985] 1 CLJ 449 dan *Kibi (M) Sdn Bhd & Yang Lain lwn Cheng Chew Chye (t/a Chuan Heng Import & Export) & Yang Lain* [1995] 1 AMR 399 diikut.

Ketakdedahan fakta material ini berhubung dengan keupayaan saksi sumpah sebagai bankrap yang belum dilepaskan tidak memenuhi darjah suci hati tertinggi dan perintah ex parte seharusnya diketepikan atas alasan ini sahaja (lihat ms 749D–E); *Tunas (Pte) Ltd v Mayer Investment Pte Ltd* [1989] 2 MLJ 132; *PMK Rajah v Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 86; *Ellinger v Guinness Mahon & Co* [1939] 4 All ER 16 dan *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 diikut.

(2) Saksi sumpah tidak boleh, disebabkan kedudukannya sebagai bankrap yang belum dilepaskan, dalam ketiadaan kebenaran dahulu daripada Pegawai Pemegang Harta atau mahkamah di bawah s 38(1)(d) Akta Kebankrapan 1967 memegang jawatan pengurus besar. Seksyen-seksyen 38(1)(d) dan 109 Akta Kebankrapan 1967 jelas melarang bankrap yang belum dilepaskan daripada menyertai pengurusan mana-mana syarikat sama ada secara langsung atau tidak langsung. Larangan itu adalah amat luas dan cukup luas untuk melarang saksi sumpah daripada menyifatkan dirinya dalam afidavitnya sebagai pengurus besar jika ia adalah bankrap yang belum dilepaskan sewaktu mengikrar afidavitnya (lihat ms 749H–I dan 750F–G); *Commissioner of Corporate Affairs (Vic) v Bracht* (1989) 14 ACLR 728 diikut.]

Notes

For cases on the capacity of bankrupt, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1277–1283.

For cases on affidavit, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

Commissioner for Corporate Affairs (Vic) v Bracht (1989) 14 ACLR 728 (folld)

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (folld)

Ellinger v Guinness Mahon & Co [1939] 4 All ER 16 (folld)

Kibi (M) Sdn Bhd & Yang Lain lwn Cheng Chew Chye (t/a Chuan Heng Import & Export) & Yang Lain [1995] 1 AMR 399 (folld)

Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat [1985] 1 CLJ 449 (folld)

PMK Rajah v Worldwide Commodities Sdn Bhd & Ors [1985] 1 MLJ 86 (folld)

Tunas (Pte) Ltd v Mayer Investment Pte Ltd & Ors [1989] 2 MLJ 132 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(d), 109, 109(m)(ii)
Bankruptcy Rules 1969
Evidence Act 1950 ss 2, 118
Trade Descriptions Act 1972 s 16

V Kumar (*Kumar Jaspal Quah & Aishah*) for the applicant.
N Chandran and *Sri Dev Nair* (*Anad & Noraini*) for the respondent.

Cur Adv Vult

Low Hop Bing J:

Facts

On 11 October 1993, an ex parte trade description order ('the ex parte TDO') was obtained by the applicant pursuant to s 16 of the Trade Descriptions Act 1972, to the effect that the trade mark 'Push Pop' used in relation to sweets and/or candies or similar products that were not manufactured or distributed by the applicant shall be deemed to be a false trade description. The order was given on the basis of matters deposed to in an affidavit in encl 2 which was affirmed by one Goh Weng Nam on 22 September 1993.

Submission for respondent

In this notice of motion (encl 9), the respondent seeks to set aside the ex parte TDO on the following grounds:

(1) the deponent Goh Weng Nam was, at the date of affirming his affidavit, an undischarged bankrupt and in consequence was incapacitated from affirming the affidavit. By reason of such incapacity, the ex parte TDO was null and void; and

(2) by reason of the non-disclosure of material facts and/or documents and misrepresentation of material facts and indeed by reason of the deliberate withholding of material information, the ex parte TDO is bad in law and should be set aside in limine.

Submission for applicant

The applicant resisted by stating that:

(1) the deponent's incapacity as a bankrupt does not prohibit him from affirming an affidavit, because the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 contain no provision whatsoever to prohibit the deponent from affirming the affidavit; and

(2) the incapacity of the deponent as an undischarged bankrupt is a fact personal to the deponent and is not a material fact and therefore

non-disclosure of the deponent's incapacity as an undischarged bankrupt does not vitiate the grant of the ex parte TDO. A

Issues for determination

From the divergent submissions herein, I am of the view that the issues for determination by the court may be stated as follows: B

(1) Is a person who is an undischarged bankrupt legally competent to perform the duties and exercise the function of affirming an affidavit in support of an ex parte application in these proceedings specifically, or for that matter, any affidavit for use in any court or proceedings generally? C

(2) What is the legal effect of the deponent's non-disclosure of his incapacity as an undischarged bankrupt and his continued description as general manager of a company in his affidavit?

(3) In holding the post of general manager in a company and in affirming the affidavit in such a capacity when he is in fact and in law an undischarged bankrupt, is the deponent directly or indirectly taking part in the management of the company? D

Decision of the court

Issue 1: Competency of an undischarged bankrupt to affirm an affidavit E

It is common ground that the deponent was, at the time of affirming the affidavit, an undischarged bankrupt.

It is trite law that an undischarged bankrupt is generally deprived of his legal capacity and hence prohibited from performing the role of an ordinary, legally competent person. However, in so far as his capacity for affirming an affidavit is concerned, I am unable to find any provision in the Bankruptcy Act 1967 or the Bankruptcy Rules 1969 which prohibits him from affirming an affidavit in his capacity as an undischarged bankrupt. The competency of a deponent of an affidavit is not removed solely by reason of his being an undischarged bankrupt. Although s 2 of the Evidence Act 1950 expressly states that the provisions of that Act do not apply to affidavits, I am of the view that s 118 thereof provides a useful analogy in that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. It has been further explained under s 118 of the Evidence Act 1950 that even a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the question put to him and giving rational answers to them. F G H I

In the circumstances, I hold that the mere fact that a deponent such as the said Goh Weng Nam is an undischarged bankrupt does not deprive him of any legal competency in affirming an affidavit in support of the ex

parte application in these proceedings specifically or, for that matter, any affidavit for use in any court or other proceedings generally.

Issue 2: Deponent's non-disclosure of his incapacity

In my judgment, a person who is an undischarged bankrupt at the time of affirming an affidavit must disclose his incapacity, eg his status as an undischarged bankrupt to the attention of the court, especially where, as in this case, the affidavit is in support of an ex parte application which is an application uberrimae fidei or of the utmost good faith so as not to be branded as misleading the court.

The status of a deponent who is an undischarged bankrupt is a material fact which must be made known to the court. It is trite law that in an ex parte application, the applicant is legally bound to make a full and frank disclosure of all material facts, since such an application is, as stated above, an application of the utmost good faith or uberrimae fidei: see *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat* [1985] 1 CLJ 449 at p 458; *Kibi (M) Sdn Bhd & Yang Lain lwn Cheng Chew Chye (t/a Chuan Heng Import & Export) & Yang Lain* [1995] 1 AMR 399 at pp 413–414. The non-disclosure of this material fact pertaining to the deponent's capacity as an undischarged bankrupt has fallen short of the standard of utmost good faith and the ex parte TDO grant pursuant thereto should, on that ground alone, be set aside: 37 *Halsbury's Laws of England* p 247, para 33; *Tunas (Pte) Ltd v Mayer Investment Pte Ltd & Ors* [1989] 2 MLJ 132 at p 133; *PMK Rajah v Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 86; *Ellinger v Guinness Mahon & Co* [1939] 4 All ER 16 and *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153.

By way of analogy, an undischarged bankrupt is under a legal obligation to inform a person with whom he engages in a trade or business or with whom he entered into a contract that he was an undischarged bankrupt: s 109(m)(ii) of the Bankruptcy Act 1967.

Issue 3: As general manager, is the deponent taking part in the management of a company?

In the deponent's affidavit, the deponent states that he is a general manager of the companies stated therein, eg Foong Seong Equipment Sdn Bhd and he further categorically says that the facts deposed to by him are in his personal knowledge or derived from the records of the applicant to which he has unlimited access. However, the deponent cannot, by virtue of his status as an undischarged bankrupt — in the absence of the previous permission of the Official Assignee or of the court under s 38(1)(d) of the Bankruptcy Act 1967 — hold the position as a general manager of Foong Seong Equipment Sdn Bhd. In *Commissioner for Corporate Affairs (Vic) v Bracht* (1989) 14 ACLR 728, the Victorian Supreme Court made it abundantly clear that the deponent as an undischarged bankrupt could not hold the position as the general manager of the company. In the Australian case, the court considered s 227(1) of the Companies Code of Victoria, which states that:

A person who is an insolvent under administration shall not be a director or promoter of, or be in any way (whether directly or indirectly) concerned in or take part in the management of, a corporation without the leave of the court.

This section may be analysed as follows:

(a) The bankrupt;

(b) Except with the previous permission of the Official Assignee or of the court, shall not:

(i) enter into or carry on any business either alone or in partnership; or

(ii) become a director of any company; or

(iii) otherwise directly or indirectly take part in the management of any company.

So far as the deponent herein is concerned, he is indisputably an undischarged bankrupt and he has not obtained the previous permission of the Official Assignee or of the court to hold the position of general manager. The deponent in holding this post comes within the provisions of s 38(1)(d) of the Bankruptcy Act 1967. The deponent therefore directly or indirectly takes part in the management of the companies stated in his affidavit. The deponent's letter of appointment states: 'You are responsible for the company's administration and business promotion as well as executing the policies of the company so given to you'. These words further strengthen my view that the deponent is directly or indirectly taking part in the management of the company. This is additionally fortified by the deponent's affidavit in which he categorically manifested that he is directly or indirectly taking part in the management of the company, ie he has the authority to manage the company.

Sections 38(1)(d) and 109 of the Bankruptcy Act 1967 clearly prohibit an undischarged bankrupt from otherwise directly or indirectly taking part in the management of any company. The prohibition is very wide in its scope and certainly wide enough to prohibit the deponent from holding himself out in his affidavit as a 'general manager' when the deponent was an undischarged bankrupt at the time of affirming his affidavit.

The principle enunciated in *Commission of Corporate Affairs v Bracht* and the provisions contained ss 38(1)(d) and 109(m)(ii) of our Bankruptcy Act 1967 clearly demonstrate the object of the prohibition for the purpose of safeguarding public interest. What is objectionable and contrary to the provisions of ss 38(1)(d) and 109(m)(ii) of the Bankruptcy Act 1967 is the very fact of the deponent holding himself out as a general manager of the company.

Conclusion

On the foregoing grounds, I hold that the deponent has contravened ss 38(1)(d) and 109(m)(ii) of the Bankruptcy Act 1967 which in turn has injuriously affected and vitiated the affidavit which he has affirmed and

which formed the very foundation and substratum upon which the ex parte TDO was granted. Stripped of such an affidavit, the foundation and substratum has gone. I therefore set aside the ex parte TDO with costs. As this matter is decided strictly on the preliminary issues, I give liberty to the plaintiff to file another application afresh, but I express no opinion as to the outcome of that proposed application if any.

Order accordingly.

Reported by Eugene Lee